

01562

DECISION



*M. Boyle
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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-186913

DATE: February 25, 1977

MATTER OF: Motorola, Inc.

DIGEST:

1. Where bidder for contract under grant fails to provide for backup generator required by invitation for bids, grantee's rejection of bid as nonresponsive and concurrence by grantor agency were proper under State law and grant conditions.
2. Offeror for contract under grant contends that grantee was required to use formal advertising method of procurement because negotiated method was not necessary. Grantee's use of negotiated method and concurrence therein by grantor agency were proper because attempt at formally advertised method resulted in no responsive bids being received and in such circumstance negotiated method was permissible under grant conditions and State law.
3. Offeror for contract under grant contends that grantee's use of negotiated method of procurement after attempt at formal advertising method which resulted in no responsive bids being received was improper because nonresponsive bidders were permitted to vary their original bid prices. Contention is without merit since once grantee was properly into negotiations it was reasonable for grantee to have accepted prices different from those submitted in original nonresponsive bids.

Motorola, Inc., has filed a complaint against the award of a contract made by the Illinois Law Enforcement Commission (ILEC) under a Department of Justice, Law Enforcement Assistance Administration (LEAA) grant.

The ILEC solicited bids for a Police Radio Communications System for the Cook County Suburban Telecommunication Network No. 17. Bids were submitted by Motorola and the General Electric Company (GE). The ILEC, with the assistance of its technical consultant, determined that Motorola's lower-price bid was nonresponsive—because Motorola

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did not indicate in its bid that it would provide an emergency backup power source at the Bellwood base station location as required by the solicitation--and that GE's higher-price bid was nonresponsive for other reasons. The ILEC then notified Motorola and GE that since no acceptable bid was submitted, the invitation for bids was canceled and a negotiated procurement for the requirement would be undertaken pursuant to the procedures of the Illinois Law Enforcement Commission Financial Guidelines dated May 1975. Both GE and Motorola entered into negotiations with the ILEC resulting in their acquiescence to ILEC equipment change requests and in downward adjustments in their original prices. Best and final offers were evaluated in accord with disclosed evaluation factors and both offers were found by the ILEC's technical consultant to be substantially equal in all respects except price where GE offered a price \$5,714 lower than Motorola's price. On that basis, the ILEC awarded the contract to GE on January 22, 1976.

Motorola protested the award to GE by letter dated January 29, 1976, addressed to the ILEC on the following grounds:

- "1. The method of contractor selection does not meet the grantee procurement standards required by Paragraph 49, Chapter III of LEAA Guideline M 7100.1A.
- "2. Assuming arguendo that there is no clear and convincing evidence of a mistake in Motorola's bid, Paragraph 2d, Section 2, Chapter 3 of LEAA Grant Manager Procurement Manual provides that if bids are not responsive to the essential requirements of the invitation, they must be rejected and the bidders cannot be permitted to remedy the defects in their offers. It provides further that no flexibility is permitted either the purchasing official or the bidder in this regard.
- "3. Although Paragraph 6(e) of Chapter 49f of M-7100.1A, Guideline Manual, provides that negotiations may be utilized if no acceptable bids have been received after formal advertising, LEAA Region V memo No. 25-28 dated December 22, 1975, addressed to all Region V SPA Directors,

states that the 'no acceptable' terminology as used here (in such paragraph) implies that acceptableness cannot be established if only one bid has been received. This means that if only one responsive and responsible bid is received, the reasonableness of the price must be determined by analysis or the sole bidder called in for negotiation. It does not mean, however, that in open competitive bidding situations, post-bid negotiations may be had between two or more non-compliant bidders.

- "4. Paragraph 1-3.214 of the Federal Procurement Regulations entitled 'Negotiation after Advertising' provides that negotiations may be conducted after formal advertising only if it is determined that bid prices are not reasonable. In the instant case no such determination has been made.
- "5. It is clear from the foregoing, that it is improper in formally advertised procurements to conduct post-bid negotiations with non-compliant bidders for the purpose of changing specifications, prices, terms, etc., or permitting any bidder to displace or obtain any advantage over any other bidder. In such cases, the non-responsive bids must be rejected if the integrity of the competitive bid process is to be maintained and all bidders are to be treated on an equal basis.
- "6. Once competitive bids have been publicly opened, it makes a mockery of the formally advertised procurement method for purchasing officials to conduct post-bid price negotiations with non-compliant bidders."

The ILEC, by letter dated March 16, 1976, denied Motorola's protest because (1) in ILEC's view, resort to a negotiated procurement was appropriate under ILEC Guideline Manual 7100.1A and required under the circumstances when the advertised procurement method failed, and (2) there was no compelling evidence that GE's price reduction was not as justifiable as Motorola's price reduction.

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Motorola, by letter dated March 31, 1976, protested ILEC's decision to LEAA on the following grounds: (1) the procurement should have been readvertised since procuring officials did not find that bid prices were unreasonable; (2) the procuring officials should not have determined for a trivial reason that no responsive bids were received and, therefore, formal advertising failed; and (3) by participating in negotiations, Motorola did not accept the propriety of such sessions.

By letter dated June 30, 1976, LEAA concurred in the ILEC's denial of Motorola's protest. LEAA determined that the ILEC's decision was rationally founded because: (1) Motorola's failure to include the third power source at Bellwood in its bid was sufficient to result in its bid being rejected as nonresponsive; (2) it was appropriate to enter into competitive negotiations with Motorola and GE after their bids were properly rejected; and (3) once the grantee, ILEC, entered into negotiations, both Motorola and GE could modify its price if it was appropriate.

By telegram of July 9, 1976, Motorola requested that our Office review the ILEC's decision and LEAA's concurrence. The basis of Motorola's complaint is that its initial bid should have been considered responsive, that it was inappropriate for procuring officials to enter into post-bid negotiations with nonresponsive bidders, and that it is contrary to basic principles of Federal procurement law to permit bidders to attend public bid openings, determine the bid prices of their competitors, and thereafter submit new proposals undercutting other offerors' prices.

Responsiveness of Motorola's Bid

While Motorola admits that it failed to list a generator for the Bellwood location, it contends that since the generator was included in its total bid price it should have been given the opportunity to correct the minor clerical mistake in the bid or such mistake should have been waived as a minor informality. Motorola contends that the various documents and exhibits it submitted after bid opening conclusively show that it intended to provide the required generator. Finally, citing several decisions of our Office, Motorola contends that in the circumstances it should have been permitted to correct its mistake after bid opening since no other bidder was displaced. 49 Comp. Gen. 480 (1970); B-164886, September 11, 1968; 18 Comp. Gen. 549 (1939); 15 Comp. Gen. 746 (1936).

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In response, LEAA argues that Motorola failed to provide for a required generator in its bid, thus resulting in the proper determination of nonresponsiveness by ILEC. LEAA also argues, citing 41 C.F.R. § 1-2.406.2 (1975) and 40 Comp. Gen. 432 (1961), that Motorola's mistake is not a minor clerical error and to allow Motorola to correct its bid after bid opening would be tantamount to allowing the submission of a new bid. LEAA concludes, therefore, that under either State law or regulations and decisions applicable to direct Federal procurements, Motorola's bid was nonresponsive.

Paragraph 49f(5) of IEAA Guideline Manual M7100.1A, applicable to this procurement, provides that any or all bids may be rejected when it is in the grantee's interest to do so, and such rejections are in accordance with applicable State and local law, rules and regulations.

Chapter 127, section 132.5, Smith-Hurd Illinois Annotated Statutes, provides that all contracts shall be in accordance with rules and regulations governing such "State agency" procurement practices and procedures which it shall promulgate and publish. Section 132.3 of that chapter defines "State agency" to include all commissions of the State. Section 132.6 provides that such State agency regulations shall include the following:

"[A]ll purchases, contracts and expenditure of funds shall be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality and serviceability
* * *."

Procurement standards promulgated by the ILEC and published in the ILEC Financial Guide (May 1975) provide that where advertised bids are received, the contract award must be made to the lowest responsive, responsible bidder, price and other factors considered. "Responsiveness," as defined in chapter 5, section 4(d) of that manual, "means that the vendor's bid conforms to all of the requirements of the IFB (i.e., if delivery is required in 90 days and the vendor proposes to deliver in 120, the bid is nonresponsive)."

Since the conditions of the grant permitted the grantee to follow State law and there is no indication that anything else was followed, and since there is an Illinois statute and ILEC rules and regulations bearing upon the propriety of the grantee's rejection of Motorola's bid, we have no need to consider the applicability

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of regulations and decisions pertaining to direct Federal procurements. See Lametti & Sons, Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265; Ampex Corporation, B-184562, October 6, 1976, 76-2 CPD 311.

Under Illinois law, the grantee could reject any bid which did not conform to the requirements of the solicitation. It is our view that the grantee's determination--that Motorola's failure to include a backup generator at Bellwood as required by the solicitation rendered its bid nonresponsive--and the grantor's concurrence have a rational basis. See Griffin Construction Company, B-185474, November 29, 1976, 76-2 CPD 452.

Propriety of Negotiated Procurement

Motorola contends that formal advertising is the required method of procurement under both Federal and Illinois law (citing Smith-Hurd Illinois Annotated Statutes, ch. 127 § 132.1, et seq.; ch. 24 §§ 8-9-1, 8-10-1, et seq.) unless express statutory authorization to negotiate exists or when it is impracticable to obtain competition through formal advertising, neither of which is present here. Motorola also contends, citing 46 Comp. Gen. 631 (1967), that negotiations were improper because both Motorola and GE had been successful bidders on previous procurements with virtually identical specifications.

The LEAA contends that State statutory law is silent as to when negotiations are appropriate; but, since all bids were properly rejected as nonresponsive, under the provisions of chapter 5, section 6(e) of the ILEC Financial Guide, it was proper for the grantee to enter into negotiations.

Paragraph 49f(5) of LEAA Guideline Manual M7100.1A, applicable to this procurement, provides that "[w]ith adequate purchase description, sealed bids and public openings shall be the required method of procurement unless negotiation pursuant to paragraph 49f(6) is necessary to accomplish sound procurement." Paragraph 49f(6) provides in pertinent part as follows:

"Procurements May be Negotiated if it is impracticable and unfeasible to use formal advertising. Notwithstanding the existence of circumstances justifying negotiation, competition shall be obtained to the maximum extent practicable. Generally, procurements may be negotiated by the grantee if:

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"(e) No acceptable bids have been received after formal advertising * * *."

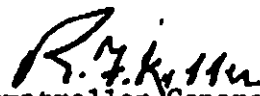
Further, chapter 5, section 6(e) of the ILEC Financial Guide, promulgated and published pursuant to chapter 127, section 132.5, Smith-Hurd Illinois Annotated Statutes, contains a provision substantially similar to paragraph 49f(6), quoted above. Thus, under the conditions of the grant and the grantee's published procurement rules and regulations, the grantee was authorized to enter into negotiations, if, as here, no acceptable bids had been received after formal advertising. Since we have determined that the grantee had a reasonable basis for rejecting all bids, it appears, therefore, that the grantee was properly authorized to enter into negotiations. Again, we need not consider any arguments based on decisions applicable only to direct Federal procurements.

Propriety of Price Changes in
Negotiated Procurement

Motorola contends, in short, that the grantee improperly conducted post-bid negotiations with nonresponsive bidders; permitted such bidders to vary their original bids; and negotiated a contract with a nonresponsive bidder (citing our decision B-163230, March 8, 1963), all of which was contrary to basic principles of Federal procurement law. In response, LEAA, relying on our decision B-157499, October 12, 1965, argues that once negotiations were properly begun, the grantee had the right to accept different prices resulting from the negotiations. LEAA also notes that both Motorola and GE were given the same opportunity to adjust their prices and, in fact, Motorola reduced its price by \$17,154 after the negotiations.

Since all bids were properly rejected as nonresponsive, and since the grantee properly entered into negotiations with Motorola and GE, it was not unreasonable for the grantee to have accepted prices different from those submitted in those firms' nonresponsive bids.

Accordingly, we find a reasonable basis for the actions of the grantee and the concurrence by the grantor.


Acting Comptroller General
of the United States